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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Appellant,<br>v.<br>JAMES T. GRAY,<br>Defendant and Respondent. | E034437<br>(Super.Ct.No. SWF 000371)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge. Affirmed in part; dismissed in part.

Grover Trask, District Attorney, and Elaina Gambera Bentley, Deputy District Attorney, for Plaintiff and Appellant.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Respondent.

## 1. Introduction

A jury convicted defendant of assault with a deadly weapon, or by means of force likely to produce great bodily injury, and battery causing serious bodily injury. (Pen. Code §§ 243, subd. (d), and 245, subd. (a)(1).)[1] The district attorney for the County of Riverside appeals from the order of the trial court granting defendant's motion to reduce the offenses to misdemeanors (§ 17, subd. (b)) and the order granting defendant probation. The former is appealable. (§ 1238, subd. (a)(6); *People v. Statum* (2002) 28 Cal.4th 682.) The latter is not. (§ 1238, subd. (d); *People v. Douglas* (1999) 20 Cal.4th 85, 94.)

We dismiss the appeal from the court's grant of probation. We affirm the judgment and the order reducing defendant's offenses to misdemeanors.

## 2. Facts

As both parties relate, one afternoon in June 2002 at Lake Perris, defendant and the victim, Lorena Carpia, were involved in a violent melee between two groups, one Hispanic, one African-American. The conflict began when children started throwing water bottles or water balloons and would not stop. The adults joined in.

According to the victim and others, she was attacked first by defendant's daughter and niece and then by his sister, Carolyn Gray. Carolyn slashed the victim's face in two places. Using his fist, defendant punched the victim in the nose, causing pain and copius bleeding.

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[1] All statutory references are to the Penal Code unless otherwise stated.

The victim's nose was swollen and painful for more than a week. She has residual pain and migraine headaches. Her nose may be slightly crooked.

Some defense witnesses testified defendant's niece, not defendant, hit the victim in the nose. Another defense witness testified a different African-American man had punched the victim. Other defense witnesses testified defendant was in the water during the fight.

At the sentencing hearing, the court denied defendant's motion to strike his two prior "strike"offenses. (§ 1385.) Both priors occurred in the 1980s and were violations of section 211. One was a purse snatching. One was a vehicle taking. The court also denied defendant's motions, pursuant to section 1181, to reduce his present convictions to misdemeanors and for a new trial. The court ultimately granted defendant's motion to reduce his two felony convictions to misdemeanors pursuant to section 17, subdivision (b).

In addressing all these motions, the court made the following observations. No showing of juror misconduct justified a new trial. The court found there was no evidence of use of a knife, either by defendant or his sister. As to the seriousness of the injuries, the court said there was no evidence of loss of consciousness or concussion; inconclusive evidence of a broken nose; no protracted loss or impairment of function of any bodily member or organ; no "extensive" suturing; and no serious disfigurement. Although the evidence of serious or great bodily injury was thin, it was sufficient to support the jury verdicts.

The court then asked for additional argument, based on section 17, subdivision (b) and *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, as to whether the court should exercise its discretion and reduce the two "wobbler" crimes to misdemeanors. The prosecution reminded the court of defendant's previous three-year and nine-year prison terms, dating from the 1980s, and a third conviction in 1997, for which he received another six-year term. Defense counsel focused on the relatively minor nature of the injuries, inflicted during a riot in which defendant's family was threatened.

Citing *Alvarez*, the court said, "I should consider the nature and circumstances of the offense, the defendant's appreciation of and attitude towards the offense, traits of character as evidenced by behavior and demeanor at trial, and many other factors that are within the discretion, within criminal history of the defendant.

". . . the conduct by the defendants was unlawful. There's no excusing what they did. . . . I believe that they should be held accountable for what was clearly criminal conduct, and the jury so found.

"However . . . as I pointed out earlier, this is barely a 245 and barely a 243. If the law says that some 245s and some 243s are supposed to be misdemeanors, then this should certainly be one that should be considered a misdemeanor because it barely qualifies, because of the nature of the injuries and the nature of the force used as to Count 1, for the felonies to begin with. . . . [T]he injuries, although significant . . . they are not of the kind of serious nature that the law contemplates typically, and if they are . . . they're barely so.

"Secondly, the defendants' involvement in this altercation did arise out of a chaotic riotous situation that they did not initiate personally. . . . [T]hey weren't the initial aggressors, although they voluntarily stepped in to the fray, each of them appeared to have done so with the -- in response to children being involved in the fracas. . . . [I]t does tend to mitigate their criminal culpability.

"The violence . . . was substantial and . . . criminal, and it qualified for the convictions of these felony offenses, but there was not gratuitous, extra additional violence. . . . All those factors, it seems to me, tend to point to this being a misdemeanor.

"However, as to Mr. Gray, he has a serious criminal history, including some violent crimes from the eighties, that cause the Court considerable concern; however, I don't believe the fact he's had those convictions precludes the Court from finding that these are misdemeanors. Indeed, in the Alvarez case the issue was whether in the face of three serious violent felonies the Court could characterize the current criminal conduct as misdemeanor conduct, and the supreme court said that was clearly something that was in the discretion of the court, could clearly be appropriate. In fact, it affirmed the exercise of the trial court's discretion."

The court also mentioned favorable letters supporting defendant. It concluded: "On balance, in this particular case I think I need to focus on the crime and his involvement in the crime, and I do find that, as to Counts 1 and 2, they should be reduced to misdemeanors pursuant to 17(b)."

The court suspended the imposition of sentencing and placed defendant and his sister on summary probation.

3. Discussion

The district attorney argues the court did not properly exercise its discretion, using the factors identified in *Alvarez.* Defendant's two offenses are classic felony-misdemeanor "wobblers," subject to reduction to misdemeanors at the court's discretion. (§ 17, subd. (b); *People v. Superior Court (Alvarez), supra,* 1997 14 Cal.4th at p. 973.) The determination to reduce an offense to a misdemeanor is especially "'dependent on a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion.' (*People v. Clark* (1971) 17 Cal.App.3d 890, 898.)" (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1730.)

In the exercise of its discretion, *Alvarez* asserted that ". . . since all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations omitted.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, rule 410. [Fn. omitted.] The corollary is that even under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.' [Citations.]" (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 978.)

The *Alvarez* court rejected the People's contention "that in a three strikes case public safety is the sentencing 'imperative' . . . ." (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 978) because "the People in effect ask that we create a nonstatutory presumption against reducing wobblers in three strikes cases. The vice of such a rule is obvious: To judicially mandate that a single factor predominate the trial court's exercise of discretion would eviscerate the essence of its statutory authority; indeed, it would be one step shy of declaring the three strikes law eliminates the court's discretion entirely. [Citation.] Neither version of the law supports such a retraction. To the contrary, both specifically acknowledge that wobblers classified as misdemeanors at the time of initial sentencing do not trigger increased penalties. [Citations.] Accordingly, we hold that three strikes prior convictions do not preclude a trial court from reducing an offense originally charged as a felony either by imposing a misdemeanor sentence (§ 17(b)(1)) or by declaring it a misdemeanor upon a grant of probation (§ 17(b)(3))." (*Id.* at p. 979.)

*Alvarez*, however, retained the requirement "to weight the various sentencing considerations commensurate with the individual circumstances. [Citations.] For that reason, the fact a wobbler offense originated as a three strikes filing will not invariably or inevitably militate against reducing the charge to a misdemeanor. Nonetheless, the current offense cannot be considered in a vacuum; given the public safety considerations underlying the three strikes law, the record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history. [Citations.] Furthermore, in evaluating the severity of a three strikes sentence relative to the gravity

of the charge, the court must remain cognizant that the present violation of law only *triggers* the mandated penalty, which ultimately is the consequence of both that offense and the defendant's recidivist status. [Citation.]" (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at pp. 979-980}

But "[t]his sentencing discretion is not without limitation." (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 980.) The court cannot base its exercise of discretion on personal antipathy toward the three strikes law. (*Ibid.*)

Here there is no evidence the court acted from improper motives or that it did not consider the relevant factors: "Therefore, notwithstanding defendant's recidivist status, the balance of other factors could warrant a reduction of the charge." (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 981.)

Instead, the trial court gave proper consideration to the meaningful factors in this case, notably the relatively minor nature of the crimes, in which defendant's level of culpability was not high and in which the victim suffered an injured nose. The court reviewed the probation report in which defendant expressed regret for what happened. The court also considered the serious and ongoing nature of defendant's criminal history "with its implications for public safety, but accorded that factor less weight than the fact it considered his current offense 'for sure' a misdemeanor." (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at p. 981.) The charged priors were more than 10 years old. Only the 1989 felony involved violence. In addition, the court had observed defendant during the course of the trial and formed some opinion about his character and demeanor.

In view of the foregoing, we intend to follow *Alvarez*: "Applying the extremely deferential and restrained standard by which appellate courts are bound in these matters, we find the trial court did not abuse its discretion. Whatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court's broad latitude. . . . [T]he lesson we reiterate today is that any exercise of that authority must be an intensely fact-bound inquiry taking all relevant factors, including the defendant's criminal past and public safety, into due consideration; and the record must so reflect." (*People v. Superior Court (Alvarez), supra,* 14 Cal.4th at pp. 981-982.)

4. Disposition

The record in the present case supports the exercise of the trial court's discretion, even if it means defendant will be spared the three strikes penalty. We dismiss part of the appeal concerning the grant of probation and affirm the judgment.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.